Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

M. JOE HERWINS,

Petitioner,

v.

THE CITY OF REVERE AND JAMES J. MAROTTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented for Review Forming the Basis of the Petition for Certiorari

1. Whether a Deliberate, Knowing or Reckless Abuse of Emergency Procedures Constitutes the Kind of Random and Unauthorized Conduct that Relieves Government From the Duty of Holding A Predeprivation Hearing?

2. Whether There is a Constitutional Right to be Notified of the Right to A Hearing After an Emergency Deprivation of Property When State Statutory Provisions Place Severe Time Constraints on the Right to Request the Hearing?

Questions Presented for Review Not Forming the Basis of the Petition for Certiorari[1]

3. Whether the Actions of Defendants Constituted Municipal Policy?

4. Whether Plaintiff Is Entitled to a New Trial on the Issue of Damages?

5. Whether Plaintiff Is Entitled to Those Attorneys Fees Awarded by the Trial Court and Whether Plaintiff's Request for Attorneys Fees Should Have Been Reduced by 20% Because of "Limited Success" When the Trial Court Acknowledged That All Claims Arose from the Same Set of Facts?

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[1] The following questions would need to be addressed to fully resolve the case if certiorari is granted. Petitioner does not suggest that these questions raise the type of substantial questions that would justify the granting of certiorari.

List of All Parties

The caption of the case contains the names of all parties. None of the parties to this action are corporations.

Table of Contents

Questions Presented for Review. i

List of Parties. ii

Table of Contents. iii

Table of Authorities. v

Opinion Below. 1

Jurisdiction. 1

United States Constitutional Provisions Involved 1

Statement of the Case 2

Facts 2

Timely Presentation of Federal Question 10

Reasons for Granting the Petition 12

I. This Case Raises the Important and Unanswered Question, on Which the Circuit Court of Appeals Have Split, as to Whether a Deliberate, Knowing or Reckless Abuse of Emergency Procedures Constitutes the Kind of Random and Unauthorized Conduct that Relieves Government From the Duty of Holding a Predeprivation Hearing.

. 12

II **This Case Raises the Important and Unanswered Question, on Which the Circuit Court of Appeals Have Split, as to Whether After an Emergency Deprivation There is a Right to Notice of the Right to a Hearing When The Right to Request Such a Hearing Under State Law is Subject to Severe Time Constraints.** 20

Conclusion 28

Table of Authorities

Cases

Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994), 75 F.3d 1311 (9th Cir. en banc 1995) 13, 14, 18, 19

Bartlett v. New York State Board of Law Examiners, 970 F. Supp. 1094 (S.D.N.Y. 1997) 17

Capozzi v. City of Olean, 910 F. Supp. 900 (W.D.N.Y. 1995) 22

City of West Covina v. Perkins, 1999 U.S. Lexis 507, _____ U.S. _____ , 142 L.Ed. 2d 636 (1999) 22, 23, 25

Clemons v. Director of the Div. of Employment Sec., 395 Mass. 174, 478 N.E.2d 951 (Mass. 1985) 24

Eli & Bessie Cohen Hillel Academy, Inc. v. Director of the Div. of Employment Sec., 396 Mass. 150, 484 N.E.2d 1022 (Mass. 1985) 24

Follkie v. City of Chicago, 1997 U.S. Dist. LEXIS 12517 (N.D. Ill.) 17

Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) 17, 18

Logan v. Zinnerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L.Ed. 2d 265 (1981) 25

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) 16

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L.Ed.2d 180 (1983) 26, 27

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 25

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981)..... ..13, 16, 17, 18

Plumer v. State of Maryland, 915 F.2d 927 (4th Cir. 1990) 17

Reetz v. Michigan, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563 (1903) 21

Wilson v. The Health and Hospital Corporation of Marion County, 620 F.2d 1201 (7th Cir. 1980) 21

Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990)..... 13, 14, 16, 17, 25

Statutes and Constitutional Provisions

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 10, 25

Fifth Amendment, U.S. Constitution 10

Fourteenth Amendment, U.S. Constitution 1, 10

Regulations

105 Code of Massachusetts Regulations § 410.201 8

105 Code of Massachusetts Regulations § 410.831

..... 5, 14, 15

105 Code of Massachusetts Regulations § 410.832 11

Opinion Below

The Opinion of the United States Court of Appeals for the First Circuit is reported at 1998 U.S. App. LEXIS 31662, 163 F.3d 15 (1st Cir. 1998) and is set forth as Appendix "A" to this Petition. App., *infra*, A1-A12. The Judgment of the United States Court of Appeals for the First Circuit which petitioner seeks to overturn is set forth as Appendix "B" to this Petition. App., *infra*, A13-A14.

Jurisdiction

The Judgment of the United States Court of Appeals for the First Circuit was issued on December 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

United States Constitutional Provisions and Local Ordinances Involved

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or Property, without due Process of law

105 Code of Massachusetts Regulations §§ 400.200, 410.831(B),(C),(D) and 410.832(B)(2), are appended to this Petition as Appendix "C", *infra,* A15-A18.

Statement of the Case

Facts

This is a case in which the First Circuit overturned a jury verdict finding that a City Code Inspector, as part of a personal vendetta against a small landlord, shut down a seven unit apartment building behind the landlord's home by falsely declaring an emergency to exist. The City[2] cut off the heat to the apartment building in the middle of the winter without giving the plaintiff M. Joe Herwins or any of the tenants any warning, a hearing or any notice of the right to a hearing before closure and failed to inform Herwins of any right to a hearing after the closure. The jury found that the City knew that an emergency did not exist at the time of the emergency declaration or was reckless in declaring the emergency and awarded Mr. Herwins both compensatory and punitive damages.

Herwins and his parents had operated an apartment building at 53A Walnut Avenue behind their family house for over 35 years. In May 1990, the defendant James Marotta, City Code Inspector for the Revere Board of Health, first inspected the building and filed civil citations in court seeking to impose $600

2

There are two defendants in the case: the City Health Inspector James Marotta and the City of Revere, Massachusetts. The jury found against both Mr. Marotta and the City, but the trial judge, without any discussion of law or the facts, summarily overturned the jury verdict against the City. The First Circuit did not reach the issue of whether the trial judge was correct in overturning the jury verdict finding that Marotta was a decision-maker with final authority with respect to the condemnation of 53A Walnut Avenue and that the condemnation letter sent under the names of both Marotta and Robert Nardone was issued pursuant to a custom, policy, ordinance, regulation or decision of the City of Revere. The City of Revere has agreed in writing to indemnify any judgment against Mr. Marotta.

in fines on Mr. Herwins for operating a roominghouse without a license and for structural problems relating to the rear stairs and porch at 53A Walnut Avenue. He also referred his concerns regarding the structural integrity of the rear stairs and porch to the city's building department.

On September 6, 1990, the Building Department brought a criminal complaint against Mr. Herwins relating to the unsafe condition of the rear stairs. On October 1, 1990, the City agreed to drop the complaint. On December 31, 1990, Mr. Herwins notified city officials including Mr. Marotta that he had repaired the stairs and invited them to inspect the work that had been done.

However, rather than inspect the repairs, on the day that the civil complaint brought by Mr. Marotta was scheduled to be heard, Mr. Marotta filed criminal complaints against Mr. Herwins relating to the stairs and porch and the alleged operation of a supposed roominghouse without a license. Mr. Marotta brought these complaints despite the fact that the building department had dropped their criminal complaint and despite the fact that 53A Walnut Avenue was listed on the City records as an apartment house and not as a roominghouse and was sited in the proper Business Zone for such use an apartment house.

In February 1992, on the day that the criminal actions were to be tried, the city agreed to drop the cases, signed a stipulation acknowledging that 53A Walnut Avenue was an apartment house and agreeing to meet forthwith with Mr. Herwins to determine whether there were any code violations at 53A Walnut Avenue. Mr. Herwins wrote a letter to city officials seeking to meet forthwith, but no one from the City ever responded.

On February 24, 1993, Cathy Fisher, a tenant at 53A Walnut Avenue, smelled gas and called the fire department. The fire department notified the Health Department who sent Mr. Marotta to inspect. When Mr. Marotta left the premises at about 10 A.M., he "promised" Mr. Herwins that he was going to close him down if it was the last thing he did.

Although Marotta testified that the heat was off at the apartment house that morning, the evidence clearly showed the heat was on at 53A Walnut Avenue, although the new tenants in a single unit had apparently utilized their gas stove to supplement heat on a cold winter morning rather than asking Mr. Herwins to turn up the thermostat. Cathy Fisher testified that the heat was on in her apartment, and that, in fact, she opened a window. The evidence was uncontradicted that the heating equipment was on and running properly when an oil company service man arrived at 11:30 A.M. and when he left the building at about noon.

That afternoon, Mr. Marotta returned with an assistant, the City Plumbing Inspector, an Assistant City Building Inspector and the Deputy Fire Chief. For approximately two hours they went through 53A Walnut Avenue inch by inch. The Deputy Fire Chief turned off the apartment's heating system because there was combustible material within 5 feet of the fuel tank and the boiler and allegedly there was an apparent leak from the oil line as well as an unshrouded underground line. When the inspectors left, Mr. Herwins removed all items being stored within 5 feet of the fuel tank and the boiler and contacted his oil company. An oil company serviceman visited 53A Walnut Avenue that night, observed that the combustible material had been moved, observed no leak from any oil line nor any unshrouded underground line, and obtained permission from the

City to turn the heat back on in the apartment building. The serviceman then turned on the switch to the burner and left at about 9:00 P.M. with the heat again on at 53A Walnut Avenue.

The next day, the City of Revere's Marotta contacted the electric company and demanded that the electricity company discontinue electric service to 53A Walnut Avenue, which once again shut down the heating system. Mr. Herwins was not afforded a hearing prior to the City's calling the electric company to shut off the heat in the building. The tenants were forced to vacate on a cold February day without any warning.

On this same day, Mr. Marotta and Thomas Nardone, Sanitary/Code Inspector for the City, signed an emergency condemnation letter requiring the tenants to vacate the premises immediately. They cited as authority for their actions section 831(d) of the state sanitary code which provides that if at any time the board of health determines in writing that the danger to the life or health of the occupant(s) is so immediate that no delay may be permitted, then it may immediately issue a finding that the dwelling is unfit for human habitation without providing notification or hearing. Not until a day after the electricity was turned off and after many of the tenants had already been forced to flee the building did Mr. Marotta appear at the site and deliver copies of the condemnation letter dated on the previous day.

The condemnation letter listed 45 alleged violations of the Sanitary Code and concluded that the violations listed above endangered the life or health of the tenants. The letter contained non-serious violations such as stained ceilings, loose faucets, the absence of window locks and a rug being found in a kitchen. The only mention of lack of heat in the letter is a reference to the fact that there was no heat in the building after

the furnace was shut off by the fire department. There was in fact no "danger" at all, let alone one "so immediate that no delay may be permitted."

The condemnation letter did not inform Mr. Herwins that he had a right to request a hearing to review the City's order condemning the building. Mr. Marotta never contacted Mr. Herwins in any manner or form to tell him that the City was intending to condemn the building prior to sending the condemnation letter nor did anyone from the City ever inform Mr. Herwins that he had a right to a hearing to contest the condemnation.

Mr. Herwins hired Anthony Galeota, a former National President of the American Society of Home Inspectors, to inspect 53A Walnut Avenue. Mr. Galeota issued a report indicating that many of the alleged violations did not even exist, and none of the alleged violations, singly or collectively, endangered the life or health of any of the tenants.

On or about September 27, 1993, Mr. Herwins through counsel sent a copy of this report to the City. Mr. Herwins offered to repair any code violations which actually existed and requested a meeting with the City.

In response, the City Solicitor contacted Mr. Herwins' attorney and informed her that the main reason that 53A Walnut Avenue had been shut down was the lack of heat in the building.

Evidence was presented at trial from which the jury could have concluded that the City decided that the reasons stated in the condemnation letter would not stand up in court as justifiable reasons for closing 53A Walnut Avenue, and thus decided to reinvent history and announce that 53A Walnut Avenue had been closed because of lack of heat in the building.

At trial, defendants insisted that 53A Walnut Avenue had

been condemned because of lack of heat in the building. In fact, at trial, Mr. Marotta admitted that none of the 45 alleged violations cited in the condemnation letter as giving cause for ordering 53A Walnut Avenue to be vacated justified the immediate closing of the building. Instead Marotta incredibly asserted that the lack of heat in the building, which was not cited as an alleged violation of the sanitary code in the condemnation letter, was the sole cause for the order to immediately vacate the building. The following evidence, however, contradicted this assertion that there was any lack of heat in the building, except during the afternoon hours of February 23, 1993, when the City ordered that the heat be turned off:

1. While Plumbing Inspector Robert Misiano testified that a gas oven or range was on heating the apartment in every unit into which he entered, Marotta stated that he did not observe a gas oven or range being on in any room.
2. While Mr. Marotta testified that the tenant with a baby told him how cold she was and upset she was because there was no heat for her baby, Mr. Misiano stated that in the unit with the baby, the man and woman were dressed in their underwear.
3. Mr. Marotta testified that Mr. Herwins had stated there was no heat because the tenants had not paid their rent. However, the evidence showed that there was only one thermostat in the house and to turn off one tenant's heat would turn off all tenants' heat, hardly a likely action for a landlord to take who wished to collect his rents and who lived next door to the apartment house which he serviced every day which kept him in constant contact with the tenants. Moreover, the tenant Cathy Fisher testified that the heat was on in her apartment that morning and Mr.

Herwins never threatened to turn off her heat when she had trouble keeping up with the rent.

4 Mr. Marotta testified that as many as seven electric space heaters were being utilized to heat the apartments, at least four of which he observed. Mr. Misiano testified he did not observe any space heaters. The leases, in fact, prohibited electric heaters, and expert testimony indicated that because of the configuration of the wiring in the house, the use of one small space heater to a reasonable certainty would have thrown a circuit breaker.

5. The tenant who called in the complaint to the Fire Department testified that she was complaining about the smell of gas and not the lack of heat.

6. The City's condemnation letter acknowledges that it was the City that ordered that the heat in the building be turned off.

7. The oil heater repairmen indicated that they checked out the City's complaints relating to the oil burner on February 23, 1993, and when they left the apartment at 9 P.M. that evening there again was heat in the house.

8. Although the City listed 45 alleged violations of the Sanitary code seeking to justify their closing the property without a hearing, they did not cite to Section 410.201 of the Sanitary Code which requires that an owner shall provide heat in every habitable room of a building.

On October 26, 1993, eight months after the closure, City Officials met with Mr. Herwins. At this meeting, the City announced to Mr. Herwins that 53A Walnut Avenue violated Principle # 6 of the plumbing code because the apartment had 7 units but only 4 bathrooms. Principle # 6 requires that each family dwelling have one bathroom. According to the City

Zoning Ordinance, a family is "a household of blood or marriage relations and not more than two unrelated persons". The only apartments at 53A Walnut Avenue which did not have private bathrooms were small single bedroom units that Herwins had rented for single occupancy. 53A Walnut Avenue had always had 7 units and 4 bathrooms and had been operated for at least 37 years as a 7 unit apartment building (in a zone appropriate for its use) without anyone from the City raising questions as to whether the building violated Principle 6 of the plumbing code. The City Plumbing Inspector, Robert Misiano, had participated in the February 24, 1993 inspection without raising any questions regarding Principle 6.

Although Mr. Herwins made a written request to Misiano for a written ruling that 53A Walnut Avenue was not in compliance with Principle 6, Mr. Misiano never responded. Nevertheless, Mr. Herwins sought review of the decision by the State Board of Plumbers seeking a declaration that he need not comply with Principle 6 as 53A Walnut Avenue was a preexisting building existing prior to the enactment of the plumbing code. At the hearing, Mr. Misiano argued against allowing 53A Walnut Avenue to operate as a pre-existing building because Mr. Herwins in 1992, in settlement of the criminal complaints against him, had agreed to comply with applicable state codes. The State Board of Plumbers denied Mr. Herwins' appeal.

53A Walnut Avenue, exposed to vandalism, animal damage and the elements, without heat or electricity since the February 24, 1993 closure, has deteriorated. Today, it is not disputed that 53A Walnut Avenue is unfit for human habitation.

Timely Presentation of Federal Question

Count I of the Complaint alleged that the defendants the City of Revere and Marotta, acting under color of law, by ordering the electric meter to be removed and the premises at 53A Walnut Avenue to be vacated without first affording Herwins an opportunity to be heard in opposition at a pre-deprivation hearing or to remedy the alleged violations deprived Herwins of his right to procedural due process secured to him under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the United State Constitution. Count II of the Complaint alleged that the defendants the City of Revere and Marotta, acting under color of law, by failing to give Herwins notice of the right to immediate review of the City's actions and/or to provide him with an immediate post-deprivation hearing deprived Herwins of his right to procedural due process secured to him under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the United State Constitution.

Judgment was entered by the trial court in favor of the plaintiff against Mr. Marotta on Count I after the jury answered "Yes" to the following three Verdict Questions:

(3) Do you find that Mr. Herwins has established by a preponderance of the evidence that James J. Marotta was a decision-maker possessing final authority with respect to the condemnation of 53A Walnut Avenue, on February 24, 1993?

(4) Do you find that Mr. Herwins has established by a preponderance of the evidence that the condemnation letter was issued pursuant to a custom, policy, ordinance, regulation or decision of Revere?

(5) Do you find that Mr. Herwins has established by a preponderance of the evidence that James J. Marotta deliberately and falsely, or with reckless disregard, concluded that 53A Walnut Avenue, City of Revere, constituted an immediate danger to the occupants and was unfit for human habitation, thereby depriving M. Joe Herwins of this constitutional right to procedural due process?

The jury awarded Herwins $55,000 in compensatory damages and $5,000 in punitive damages to be paid by the defendant Marotta.

The trial court set aside the jury's finding against the City on Count I, concluding that the condemnation letter was not issued pursuant to a custom, policy, ordinance, regulation or decision of the City.

Count II was tried to the Court as an issue of law on which there were no disputed facts, as the City had conceded that it had never given Mr. Herwins any notice of his right to a hearing even though such notice was required under state regulations. 105 CMR § 410.832(b)(2). App. "C", *infra*, A18. The Court found for the defendant.

The City appealed the jury's finding on Count I and Herwins filed a cross-appeal challenging the granting of judgment as a matter of law to the City on Count I, the trial judge's decision in favor of both defendants on Count II, and the denial of his motion for a new trial on the issue of damages.

Reasons for Granting the Petition

I. This Case Raises the Important and Unanswered Question, on Which the Circuit Court of Appeals Have Split, as to Whether a Deliberate, Knowing or Reckless Abuse of Emergency Procedures Constitutes the Kind of Random and Unauthorized Conduct that Relieves Government From the Duty of Holding A Predeprivation Hearing.

This is a case in which the jury found that the defendant deliberately misused emergency procedures in order to shut down an apartment building which the defendant knew could not be shut down under the law. The jury concluded that the City ***"deliberately and falsely, or with reckless disregard***, concluded that 53A Walnut Avenue, City of Revere, constituted an immediate danger to the occupants and was unfit for human habitation". The First Circuit accepts for purposes of its opinion that "Marotta's prompting of the closure letter was without basis and ***that he knew this to be so or acted recklessly***". App. "A", *infra*, A5. Yet, the First Circuit concluded that where an official errs in declaring an emergency, the only feasible procedure is a post-deprivation remedy, rather than holding the official liable for an abuse of the legitimate procedures established by the state.

The issue presented by this case is whether a government agency can deliberately misuse with foresight emergency procedures in order to avoid constitutionally mandated procedural protections under the guise that it is unforeseeable that an official might abuse legitimate emergency procedures.

The Ninth Circuit, unlike the First Circuit, has answered with a resounding "No". The case of *Armendariz v. Penman*, 31 F.3d 860 (9th Cir. 1994), 75 F.3d 1311, 1316 (9th Cir. en banc 1995)(revd. in part, affd in relevant part) totally rejected the First Circuit's conclusion that a government official can deliberately misuse with foresight emergency procedures to deny predeprivation hearings on the pretext of unforeseeability of the official's actions. In *Armendariz*, the City of San Bernadino had closed a number of low-income housing units without pre-deprivation hearings pursuant to a series of housing code inspections aimed at forcing persons with criminal records to relocate outside of the City. The plaintiffs, as in this case, did not challenge the sufficiency of protections provided under California law, but alleged that defendants abused those procedures in invoking an emergency. The court rejected defendants' motion for summary judgment, declaring:

> *Parratt* does not apply where 'the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out state policy act under the apparent authority of those directives. In addition, *Parratt* does not apply where deprivation is predictable, pre-deprivation process is not impossible, and the defendants are specifically charged with the authority to effect the deprivation charged. The San Bernadino plaintiffs allege that defendants knew there was no emergency. . . . [Plaintiffs' allegations more closely approximate the situation in *Zinermon* than *Parratt*. The defendants are those persons who are assigned the duty of interpreting and enforcing the housing and fire codes. If plaintiffs' allegations are true, it would have been reasonably foreseeable that the deprivation would occur

since it was the intent of the defendants for it to occur. Also, if the emergency was a fabrication, then pre-deprivation process was possible. (citations omitted).

31 F.3d at 866.

There is a fundamental error in the First Circuit's reasoning. On the one hand, they acknowledge the jury finding that Marotta knew that an emergency did not exist. Yet, they conclude that Marotta and the City cannot be held liable for its "mistakes". App. "A", *infra*, at A8. What happened in this case was no "mistake". Marotta did exactly what he intended to do. The City's actions were the type of abuse of process which this Court found in *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L. Ed. 2d 100 (1990) not to excuse the government from its duty to provide pre-deprivation process. The jury made clear that there was no "danger to the life or health of the occupants" at all, let alone one "so immediate that no delay may be permitted." 410 CMR § 831 (D), App., *infra*, at A17.

The First Circuit seeks to distinguish this case from *Zinermon*. The First Circuit concluded, *infra* at A9:

> [S]ince the procedure [of admissions and waiver] was itself authorized by state law, Zinermon's admission was not a 'random and unauthorized' act of an individual employee or an 'unpredictable' departure from state law. *Zinermon*, 494 U.S. at 136. Confinement of patients not competent to consent was easily foreseeable and pre-deprivation screening could feasibly be provided in non-emergency cases. *Id.*
>
> By contrast, Massachusetts does provide for an opportunity to object before a building is shut down except in emergencies. While state law led Marotta to invoke

summary closure, his 'authorized' use of the summary power would not violate the Constitution, and improper use is exactly the kind of 'random and unauthorized' conduct that the local government had no duty (and no practical way) to forestall through a pre-deprivation hearing - - a procedure itself inconsistent with true emergency conditions.

In fact, the Massachusetts statutory scheme for condemning buildings and the Florida statutory scheme that this Court found illegal because of the possibility of abuse have many important similarities. As it was foreseeable in Florida that officials would take a short cut by voluntarily admitting patients rather than seeking to admit patients only after initiating involuntary admission hearings, it is equally foreseeable that the Massachusetts scheme allowing the condemning of building under both "emergency" and "non-emergency" situations would be abused as occurred in this case.

A building can be closed in Massachusetts in a "non-emergency" only after notification to occupants and the owner and only upon a finding that the dwelling is "unfit for human habitation". 105 CMR § 410.831(A), App. "C", *infra*, at A16. A building can be condemned in Massachusetts without a prior hearing upon a finding that the dwelling is "unfit for human habitation" and upon a finding that "the danger to the life or health of the occupant(s) is so immediate that no delay may be permitted." 105 CMR § 410.831(D), App. "C", *infra*, at A17. It is difficult, if not impossible, to understand how a building which is truly "unfit for human habitation" would not pose a "danger to the health" of the occupants. This hearing requirement in "non-emergency" situations, like the hearing requirement in Florida for involuntary commitments, cries out

to be bypassed and ignored. It is certainly foreseeable that an official would take the easier course not subject to review, particularly in circumstances, such as in this case, where the official has set out on a deliberate course to declare an emergency that he knows does not exist.

In *Zinermon*, the Court declared that *Parratt* "represent[s] a special case of the *Mathews* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide. . . .In situations where the State feasibly can provide a predeprivation hearings before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." 494 U.S. at 128, 134, 110 S.Ct. at 985, 987. In this case, by establishing a procedure whereby predeprivation hearing are to be held prior to a declaration that a building is "unfit for human habitation", Massachusetts has acknowledged that predeprivation hearings can be held even in an arguably emergent situation in which a dwelling is allegedly unfit to be lived in. A predeprivation hearing would certainly have prevented the defendants' fabrication of an emergency in this case.

The First Circuit characterizes Marotta's actions as "unauthorized". There is no dispute that Mr. Marotta, as part of his duties and responsibilities, had the authority to send out an emergency condemnation letter. His actions were only "unauthorized" in the sense that Marotta and the City knew an emergency did not exist. Such a deliberate action is an abuse of authority and not a random act. As this Court stated in *Zinermon*,

> [P]etitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt*

> and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their interests) the procedural safeguards required before deprivations occur. The deprivation here is "unauthorized" only in the sense that it was not an act sanctioned by state law, but, instead was a "depriv[ation] of constitutional rights . . . by an official's abuse of his position." *Monroe*, 365 U.S., at 172, 81 S.Ct., at 476.

Courts in other circuits than the Ninth Circuit have applied the rationale underlying the *Zinermon* case to find circumstances such as exist in this case not to be "unauthorized" and "random". In *Plumer v. State of Maryland*, 915 F.2d 927, 931 (4th Cir. 1990), the Court, quoting *Zinermon*, 494 U.S. at 138, concluded that when a State can and does charge its employees with the "duty to initiate" procedural safeguards, the availability of an adequate state remedy does not, standing alone, satisfy Due Process. In *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1140 (S.D.N.Y. 1997), the court held that actions taken by high-ranking officials having final authority over the decision-making process cannot be random or unauthorized within the meaning of *Parratt* and that along with the authority given to such decision-makers comes the concomitant duty to not act arbitrarily or capriciously. In *Follkie v. City of Chicago*, 1997 U.S. Dist. LEXIS 12517, *14

(N.D. Ill.), the Court declared that if conduct is engaged in pursuant to the custom or policy of a municipality, it cannot be viewed as random or unauthorized in the *Parratt* sense of the words.

The First Circuit correctly notes that this Court in *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed. 2d 393 (1984) held that intentional as well as negligent actions may be so random, unauthorized and unforeseeable that predeprivation process is not feasible. However, the intentional destruction of a prisoner's property, which could not be prevented by any process of predeprivation hearings, is far different than the intentional declaration of an emergency which a government official knows not to exist in order to avoid an existing process which would have required a predeprivation hearing if the official had not intentionally sought to circumvent the law.

The First Circuit warns of a slippery slope that could follow from adopting the Ninth Circuit standards set forth in *Armendariz*. They argue that but for their ruling "federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances. Often these errors have a procedural dimension - - e.g., a tax lien imposed after a misaddressed notice of taxes due – and inflict temporary harm or inconvenience." App. "A", *infra*, at A8. However, as noted above, the City's actions in this case were not mistakes subject to second-guessing in hindsight. Rather, the City was found to have deliberately evaded known procedures in furtherance of a trumped up emergency.

Plaintiffs suggest that the actual dangerous slippery slope lies in allowing the First Circuit opinion to stand. If government officials can deliberately misuse emergency procedures established for condemnations without facing liability,

government officials can deliberately misuse all emergency procedures. Under the First Circuit's logic, government officials can knowingly evoke emergency exceptions to requirements for bidding government contracts even though they know that no emergency exists, because unsuccessful bidders can always file after the fact bid protests. This could result in awards of contracts to bidders providing inferior products or might result in the wholesale ignoring of set-aside laws; and even if it took years for these remedies to run their course and for all of these years the government would be stuck with the inferior products, this would all be permissible, because it was not foreseeable that the government would deliberately misuse the emergency exceptions to the bid laws and monetary damages would potentially be available to a successful bid protester. This logic ignores the fact that emergency provisions were established as the "exceptions" to the rule, and that the rules were established because they embody some social benefit, such as assuring that tenants do not get summarily tossed out into the cold as occurred in this case, unpopular classes of individuals such as suspected gang members and drug dealers not get harassed as occurred in *Armendariz*, or the government receive the best quality products at the best possible price under the ordinary governmental bidding procedures. Emergency provisions must by definition remain the exception to the rule, and it is extremely important for this Court to make clear that deliberate misuse of emergency provisions will not be tolerated and that government officials and entities shall be liable for such a misuse of emergency provisions.

II This Case Raises the Important and Unanswered Question, on Which the Circuit Court of Appeals Have Split, as to Whether After an Emergency Deprivation There is a Right to Notice of the Right to a Hearing When The Right to Request Such a Hearing Under State Law is Subject to Severe Time Constraints.

There is no dispute that the controlling regulation required the City to give notice to Herwins of his right to request a post-deprivation hearing. Nor is there any dispute that the City failed to give Herwins notice of a right to a hearing. Indeed, the First Circuit noted, App. "A", *infra* at A4, that "the City of Revere conceded that the letter had not included notice of right to appeal even though such notice was required under state regulations." In oral argument before the First Circuit, the City admitted that they had made a mistake in failing to notify Mr. Herwins of his right to a hearing. In its brief to the First Circuit, the City and Marotta made what one would have thought was an outcome determinative admission when they admitted that "It is evident that the mandates of procedural due process require notice of the opportunity for a hearing." Nevertheless, the First Circuit ruled, App. "A", *infra*, A10:

> The state's failure to provide a landlord with express notice that he can seek review may violate state law but does not render the review remedy constitutionally inadequate. In most civil matters, citizens are expected to ask about the method to protest or appeal an initial administrative action

(or to hire a lawyer).[3] An experienced landlord like Herwins would hardly suppose that no opportunity existed to challenge the emergency shutdown order, even if he was not himself a lawyer (in fact he was).[4]

They reached this conclusion without citing to a single case and in direct conflict with a contrary ruling of the Seventh Circuit in the case of *Wilson v. The Health and Hospital Corporation of Marion County*, 620 F.2d 1201 (7th Cir. 1980).

In *Wilson*, the Seventh Circuit declared that the County Health Officer's issuance of an emergency order condemning an apartment as unfit for human habitation violated the landlord's right to due process, because the order did not give any notice to the landlord that he had a right to a hearing. The Seventh Circuit overturned the lower court's ruling that "the provisions for a hearing within the ordinance itself was sufficient notice of

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The First Circuit's characterization of the issue as a right of notice to appeal an administrative decision is disingenuous. There may indeed be less of a right to notice of *appeal* following an administrative hearing, as the parties presumably have already been notified of their right to the initial hearing and the rights which accompany the hearing, such as right to counsel. There is far less need to be informed of the right to appeal an administrative hearing than there is to be informed of the right to an initial hearing, whether or not that hearing is predeprivation or postdeprivation. *See, Reetz v. Michigan*, 188 U.S. 505, 509, 23 S. Ct. 390, 47 L.Ed. 563 (1903) (Court imputes knowledge of a statute to a doctor, regarding how to appeal the denial of his license to practice medicine, when he had already utilized the statute in filing his initial application.)

4

The First Circuit discusses the merits of Herwins' claim that he was constitutionally entitled to notice of his right to request a hearing in the context of the adequacy of the post-deprivation remedies afforded Herwins. For the same reasons stated in this Petition, the First Circuit's conclusion that the post-deprivation process was adequate is also flawed.

the right to a hearing to meet due process standards." *Id.* at 1208. The Court declared:

> We also believe it is unrealistic to require each individual to be conversant with the procedural provisions of city or county ordinances, especially where the individual is faced with a potential condemnation of his property if he misreads or is not entirely familiar with that ordinance and is not informed of his right to appear to contest the condemnation. When the individual fails to exercise the fundamental procedural right to a hearing granted to him under the ordinance and required by due process because he was not informed of that right by the government authorities, we do not believe it is adequate for the government simply to rely upon the time worn adage that "ignorance of the law is no excuse." Thus, we find that appellees' notice procedure of relying upon the public character of the ordinance was not "reasonably calculated" to inform appellant of the availability of a hearing and that personal notice is required and will not impose an unreasonable burden upon the appellees.

See, also, Capozzi v. City of Olean, 910 F. Supp. 900, 909-911 (W.D.N.Y. 1995)(Allegations of failure to provide notice of right to hearing after emergency closure of dwelling for lack of heat makes out a claim of violation of right to procedural due process).

This Court's recent decision in *City of West Covina v. Perkins*, 1999 U.S. Lexis 507, _____ U.S. _____, 142 L.Ed. 2d 636 does not require upholding the First Circuit's opinion. Rather, this Court's opinion in *West Covina* stops where this case begins. In *West Covina*, this Court concluded that there is no absolute right to notice of postdeprivation procedures set

forth in state laws. However, in *West Covina*, this Court did not note any pressing time constraints on the plaintiff to seek the return of his property and there is no reason to believe that the plaintiff in fact did not have adequate time to acquaint himself with the provisions of state law prior to seeking the return of his property.[5]

West Covina is far different than the case at hand in which Herwins had only seven days under state law to request a hearing after being informed that his apartment building had been condemned. Even if Herwins did not need to spend much of his time shutting down the apartment building, the seven day period is so inherently short as to require notice of the time constraints for requesting the hearing. In fact, Herwins needed to do the following as a direct consequence of the condemnation: (1) drain the plumbing and heating systems (specialized plumbing services needed) and (2) assist tenants to relocate (with all their possessions) who also had no prior warning of what would be a need a quickly relocate. The procurement of legal counsel was not Herwins' immediate priority. In *West Covina*, this Court concludes that "a primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." 1999 U.S. Lexis 507, at *10, ____ U.S. ____. Certainly, if a person was given only twenty four hours to request a hearing,

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It appears from the facts of the case that plaintiff waited more than one month to seek the return of his seized items and that there were no statutory barriers to his having waited this long prior to seeking the return of his property. 1999 U.S. Lexis 507 at *6, _____ U.S. _____. In fact, plaintiff in the *West Covina* case eventually successfully obtained the return of his property through the state court system.

regardless of whether he was given notice of his right to request the hearing, no court would find that the person was given a meaningful opportunity to obtain a hearing. Similarly, providing a person with only seven days to request a hearing, but not informing the person that he must act in such a short period of time, cannot be found to provide the person with a meaningful opportunity to be heard.[6]

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[6] The First Circuit notes that Massachusetts courts tend to allow appeals where the untimeliness was a consequence of the actions of the administrative official. App. "A", *infra*, at A13. Certainly the parameters of a constitutional right to notice are not subject to the whims of discretionary "tendencies" of a state court system. Moreover, the cases cited by the First Circuit hardly indicate, as implied by the First Circuit opinion, that if Mr. Herwins had only sought a late hearing that the state courts would have allowed him to do so. The First Circuit cites to two Massachusetts cases: *Eli & Bessie Cohen Hillel Academy, Inc. v. Director of the Div. of Employment Sec.*, 396 Mass. 150, 484 N.E.2d 1022, 1024 (Mass. 1985); *Clemons v. Director of the Div. of Employment Sec.*, 395 Mass. 174, 478 N.E.2d 951, 953 (Mass. 1985). In *Hillel*, citing *Clemons*, the Massachusetts Supreme Judicial Court held:

> Normally, failure to pursue appropriate review procedures - administrative or judicial - within the strictures of the relevant statutes or rules will bring dismissal of the appeal. Yet "[a] claimant who is found to have been directly discouraged by an administrative official from pursuing an appeal has good cause . . . for any consequent delay in filing that appeal."

Hillel Academy, supra, at 1024. In both cases, the court found that the administrative agency actually "misled" the applicant into believing the agency would hear the claims without the need for filing any further requests for review. In the case at hand, no one is claiming that the City "misled" or "discouraged" Herwins from requesting a hearing; rather, the City never informed Herwins that he had a limited time window during which he must request a hearing. The state court most probably would have followed its "normal" rule and not allowed Herwins to file a request for a late hearing. The only evidence at such a hearing would have related to the court's jurisdiction and the reasons Herwins did not request a hearing in seven days and Herwins would not even have had an opportunity to

The instant case is quite different from the *West Covina* case in that the Massachusetts law by which the city condemned Herwins' property requires specific notice. Unlike in *West Covina*, where state law did not require the giving of notice of the rights that plaintiff sought under the Constitution, in this case, state law did require giving Mr. Herwins notice of the right to a hearing. Massachusetts law required such notice, because the drafters of the law knew that the right to a hearing in such a limited window of time would not be meaningful if the property owner was not given notice of the right to the hearing. However, the City of Revere ignored the law.

This Court has made clear that the requirement to provide notice of the right to a post-deprivation hearing is a constitutional right and not merely an entitlement under state law as found by the First Circuit.[7] In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865

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present to the Court the evidence of the trumped up nature of the emergency condemnation.

7

While the First Circuit characterizes the City's failure to provide notice as nothing more than a violation of state law, in *Logan v. Zinnerman Brush Co.*, 455 U.S. 422, 432, 102 S. Ct. 1148, 71 L.Ed. 2d 265 (1981), this Court declared that "because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." (citation omitted). *See, also, Zinermon, supra* at 982 ("'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.")(citation omitted).

(1950), this Court noted that although "many controversies have raged about the cryptic and abstract words of the Due Process Clause of the Fourteenth Amendment . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case." The Court concluded:

> The fundamental requisite of due process of law is the opportunity to be heard. [citation omitted]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. *Id.* at 314.

See, also, Mennonite Board of Missions v. Adams, 462 U.S. 791, 795-797, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) (Due process is not satisfied when the entity charged with affording notice relies on chance to bring the salient issues to the attention of the person whose property rights are at risk).

In this case, the First Circuit has declared that in emergency situations, not only is a property owner not entitled to a predeprivation hearing, but also the property owner is not entitled to notice of the right to a postdeprivation hearing. And according to the First Circuit, this lack of rights even exists in cases of trumped up emergencies. The First Circuit has concluded that the government can wreak havoc on a landlord and his tenants by trumping up an emergency claim to condemn property, shut down the heat in a building requiring the evacuation of all tenants, and then not give notice that the landlord only has seven days to request a hearing to overturn these illegal governmental tactics.

The First Circuit takes solace in the fact that Mr. Herwins is an "experienced landlord" and an attorney.[8] App. "A", *infra*, A13. This, of course, infers that being a member of such a class invalidates whatever Due Process protections would be otherwise accorded a member of the general public. Bedrock constitutional provisions requiring notice and/or a hearing are not dependent upon such a distinction. Indeed, as this Court stated in the *Mennonite Board of Missions* case:

> [A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence. But it does not follow that the State may forgo even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

462 U.S. at 799-800.

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[8] The Court's characterization of Mr. Herwins as an experienced landlord and attorney could not be more misleading. Herwins was a landlord by reason of renting out the property behind his house. He was an Internal Revenue Services Agent who was never in private practice and never held a job in his life involving issues relating to the State Building Code, State Sanitary Code of State Plumbing Code.

All of the issues in this case center on the question of whether the Constitution prohibits the abuse of emergency procedures. And because emergency procedures, while frequently necessary, always offer the short cut around the rules, it is important for this Court to make clear that deliberate ignoring, avoiding and misusing emergency powers is not permissible under the due process clause.

Conclusion

For the reasons stated above, the petition for certiorari should be granted.

Respectfully Submitted,

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February 1999

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Table of Contents: Appendix

Appendix "A"

Opinion of the United States Court of Appeals for the First Circuit A1

Appendix "B"

Judgment of the United States Court of Appeals for the First Circuit A13

Appendix "C"

Applicable Code of Massachusetts Regulations A15

Appendix "A"

M. JOE HERWINS, Plaintiff, Appellant, v. THE CITY OF REVERE, ET AL., Defendants, Appellees. M. JOE HERWINS, Plaintiff, Cross-Appellee, v. JAMES J. MAROTTA, Defendant, Cross-Appellant.

No. 97-2140, No. 97-2141

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

1998 U.S. App. LEXIS 31662

December 17, 1998, Decided

PRIOR HISTORY: [*1] APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Morris E. Lasker, * U.S. District Judge.

* Of the Southern District of New York, sitting by designation.

DISPOSITION: Judgment on count I reversed and award of attorney's fees and costs vacated and judgment on count II affirmed.

COUNSEL: Ira H. Zaleznik with whom Lawson & Weitzen, LLP was on brief for appellant James J. Marotta.

Stephen Schultz with whom McGowan, Engel, Tucker, Garrett & Schultz was on brief for plaintiff.

JUDGES: Before Torruella, Chief Judge, Boudin and Stahl, Circuit Judges.

OPINION BY: BOUDIN

OPINION: BOUDIN, Circuit Judge. M. Joe Herwins, the plaintiff in the district court and cross-appellant here, owned a building at 53A Walnut Avenue in Revere, Massachusetts, in which rooms or apartments were rented to tenants. On February 24, 1993, the defendant-appellant James J. Marotta, a board of health inspector for defendant-appellant the City of Revere, arrived to inspect the building, prompted by a complaint as to the smell of gas or a lack of heat (there is some dispute as to which). It is undisputed that one of the tenants was utilizing a gas stove to provide heat.

Marotta reported [*2] to his superior--City Health Agent Michael Pepe--that there was no heat in the building, and later in the day Marotta returned to do a further inspection with other city officials. n1 Following the inspection, Marotta reported to his superior, and a letter was drafted to Herwins specifying a large number of alleged violations and concluding that the building was "unfit for human habitation and must be vacated forthwith." See Mass. Regs. Code tit. 105, §§ 410.750, 410.831(D) (1941).

n1 Testimony conflicted as to when and for what period the heat was off. Herwins testified later that it was on in the morning and only turned off in the afternoon by the deputy fire chief for violations that were then remedied by Herwins.

Marotta immediately served the letter upon Herwins and the tenants, who then vacated the building. Seven months later, in September 1993, Herwins hired an expert to make a private inspection of the building. The expert concluded that many of the alleged violations did not exist and that the violations, [*3] even taken together, did not endanger any of the tenants. The city responded to the expert's report by stating that the main reason for the shutdown was the lack of heat. At a subsequent meeting with city officials in October 1993, the city plumbing inspector told Herwins that in order to reopen Herwins would have to provide a separate bathroom for each unit. The meeting ended in disagreement between the parties.

Herwins subsequently took an appeal to a state board to review the plumbing inspector's determination. The appeal apparently depended on whether the structure was a building existing prior to the enactment of the plumbing code and whether Herwins had nonetheless agreed to comply with the code. The appeal was rejected in May 1994. Herwins did not seek further review of this decision in court and did not seek to reopen the building. Instead, in November 1995, he filed the present two-count complaint in district court against Marotta and the City of Revere asserting violation of his constitutional rights under *42 U.S.C. § 1983.*

In each count, Herwins charged that Marotta and the City of Revere had violated his right to procedural due process under the

Fourteenth Amendment. [*4] In the first count, Herwins charged that the violation was the closure of his building without prior notice or hearing. The second count charged that the City of Revere had violated procedural due process by failing to advise him, in the letter directing closure of the building, that he had a right to undertake an administrative appeal from that determination. Herwins requested a jury trial on the first count of the complaint. On the second count, both sides agreed that the issue should be tried by the district judge because there were no contested issues of fact; the City of Revere conceded that the letter had not included notice of right to appeal even though such notice was required under state regulations. Mass. Regs. Code tit. 105, § 410.832(B)(2). Defendants' request for summary judgment on both counts was denied.

In May 1997, count I was tried to a jury. There was conflicting testimony about the events on the day of the closure, including a dispute as to whether the heat in the building was off when Marotta initially inspected the building and reported to the Health Agent that there was no heat. Pertinently, Herwins testified that Marotta had said to Herwins, at the time [*5] that Marotta left the premises in the morning, that he was going to shut down the building if it was the last thing that Marotta did.

This last remark created a link to testimony by Herwins concerning his prior relationship with Marotta and the City of Revere. Over defendants' objection, the jury was told that Marotta had inspected the building in May 1990 and filed civil citations charging Herwins with operating a rooming house without a licence and for structural problems relating to the stairs and porch of 53A Walnut Avenue; that the city had later filed

criminal charges against Herwins, prompted in part by Marotta; and that in February 1992, the city had discontinued the criminal proceedings.

Ultimately, the jury returned a verdict on count I against both Marotta and the City of Revere. In answer to specific questions, the jury found that in closing down the building Marotta had falsely or recklessly reported that there was an immediate danger to the tenants. The district court set aside the verdict against the City of Revere but refused to set aside the verdict against Marotta. The jury's determination as to damages--$55,000 in compensatory damages, $5,000 for punitive damages--was [*6] allowed to stand as to Marotta.

Thereafter, the district court decided count II under Fed. R. Civ. P. 52. The court ruled as a matter of law that Herwins had no claim under count II against either Marotta or the City of Revere because failing to give him notice of his appeal rights was not a denial of due process but only a violation of state law. On motion by Herwins, the district court also awarded attorney's fees in the amount of just over $95,000 plus costs of almost $9,000.

Following post-trial motions, Marotta filed an appeal to contest the verdict and award of damages and attorney's fees against him. Herwins cross-appealed, challenging the grant of judgment as a matter of law to the City of Revere on count I, the trial judge's decision in favor of both defendants on count II, and the denial of his motion for a new trial on the issue of damages. Herwins also sought review of the award of attorney's fees, claiming that the amount ordered was inadequate.

On this appeal, the dispositive issues are ones of law and are considered de novo. See *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 757 (1st Cir. 1992).* We will assume arguendo that the jury [*7] properly found on count I that Marotta's prompting of the closure letter was without basis and that he knew this to be so or acted recklessly. But we conclude that under controlling precedent this does not give rise to a constitutional claim for denial of procedural due process because state law offered adequate remedies. We address this issue first, turning thereafter to count II and to the award of attorney's fees.

The first count of Herwins's complaint alleged that the closure of his building through emergency procedures violated his right to procedural due process under the Fourteenth Amendment. Massachusetts law permits an inspection to trigger an immediate shutdown of a building where an emergency exists threatening health or safety, subject to later opportunity for review at the building owner's behest. Mass. Regs. Code tit. 105, §§ 410.831(D), 410.850. Marotta argues that due process required that he be provided a "pre-deprivation" hearing and, alternatively, that post-deprivation remedies were not adequate.

Due process normally requires notice and opportunity for "some kind of hearing," *Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 19, 56 L. Ed. 2d 30, 98 S. [*8] Ct. 1554 (1978),* prior to a final deprivation of liberty or property. See id.; *Parratt v. Taylor, 451 U.S. 527, 540, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).* This generalization is a very loose one. There are deprivations so limited that no prior "process" is due, e.g., a Terry stop, see *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88*

S. Ct. 1868 (1968); and conversely, there are requirements of due process in some instances where the "property" interest is pretty thin by conventional standards. See, e.g., *Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).*

Whether the opportunity needs to be furnished before the seizure or whether a post-seizure opportunity is sufficient depends on the circumstances. Where feasible, the opportunity (for obvious reasons) is expected to be pre-deprivation, see *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985),* but this is not always feasible. Two situations in which a post-deprivation opportunity is sufficient were set forth in *Parratt v. Taylor, 451 U.S. 527, 539, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981)* (footnote omitted), as follows:

Either [*9] the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisfies the requirements of procedural due process.

No one can seriously doubt that emergency conditions may exist (e.g., a severe fire hazard) that would warrant a peremptory shutdown of a residential building. Herwins does not dispute that "quick action" may be required for such emergencies, nor does he specifically challenge the general standards set forth in Massachusetts law for determining when emergency closures should be ordered. Of course, the jury found that there was no emergency in this case, but that shows only that Marotta's substantive decision was wrong; he was not required to hold a hearing before declaring an emergency.

One might ask why this should matter: after all, as a result of Marotta's substantive decision, Herwins suffered a wrongful shutdown of his building. But the city provided all of the procedural protection it could in requiring a prior hearing for closures based on non-emergency [*10] violations. Where an official errs in declaring an emergency, the only feasible procedure is a post-deprivation remedy, which the city also provided. See *Hudson v. Palmer, 468 U.S. 517, 531-533, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984).*

Of course, the law might have developed so as to hold the official liable under the Fourteenth Amendment for his own mistake even if the state had done all it could. Absent Marotta's mistake, Herwins would have had a prior hearing before closure. But the Supreme Court has ruled that in such cases there is no denial of procedural due process, even by the official, so long as the state provides an adequate means of redress. The Supreme Court has held this both where the official's action is negligent, *Parratt, 451 U.S. at 543-44,* and where it is deliberate, *Hudson, 468 U.S. 517, 536-37 n2, 82 L. Ed. 2d 393, 104 S. Ct. 3194.*

n2 This ruling has been followed by the First Circuit in a number of cases, see, e.g., *Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 33 (1st Cir. 1996); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 534-537 (1st Cir. 1995); Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992),* as well as by other circuits, see, e.g., *Nance v. Vieregge, 147 F.3d 589, 591-592 (7th Cir. 1998).*

[*11]

But for this limitation, federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances. Often these errors have a procedural dimension--e.g., a tax lien imposed after a misaddressed notice of taxes due--and inflict temporary harm or inconvenience. Assuming that the state remedies are themselves adequate, it has seemed sufficient to leave such random and individual errors to be corrected by state courts and agencies.

Herwins's claim is not aided by his repeated reliance upon *Zinermon v. Burch, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990).* There, Florida law permitted an individual to be admitted as a voluntary patient in a mental hospital, and to waive his right to release on request, without any determination that the person was competent to make such a waiver. The Supreme Court held that when Zinermon was wrongly detained, through the use of this flawed procedure, the state might be subject to liability for a denial of procedural due process.

In distinguishing Parratt, the Supreme Court said that the Florida procedure of admissions and waiver was not restricted to emergencies. [*12] And, since the procedure was itself authorized by state law, Zinermon's admission was not a "random and unauthorized" act of an individual employee or an "unpredictable" departure from state law. *Zinermon, 494 U.S. at 136.* Confinement of patients not competent to consent was easily foreseeable and pre-deprivation screening could feasibly be provided in non-emergency cases. Id.

By contrast, Massachusetts does provide for an opportunity to object before a building is shut down except in emergencies. While state law led Marotta to invoke summary closure, his "authorized" use of the summary power would not violate the

Constitution, and improper use is exactly the kind of "random and unauthorized" conduct that the local government had no duty (and indeed no practical way) to forestall through a pre-deprivation hearing--a procedure itself inconsistent with true emergency conditions. Cf. *Hudson, 468 U.S. at 533.*

Herwins's alternative argument is that the city did not provide an adequate post-deprivation remedy. It is undisputed that Herwins could have challenged the shutdown by appealing the order to the City of Revere Board of Health and, if dissatisfied with its decision, [*13] could have appealed the ruling to the state courts. Mass. Regs. Code tit. 105, §§ 410.850, 410.860. This is a conventional regime for redressing administrative error, making it unnecessary for us to consider whether there exists an alternative judicial remedy of common law certiorari (which Marotta asserts exists and Herwins disputes).

Herwins objects that the appeal to the Board of Health had to be filed within seven days and that the failure to give him notice of this option--as required by state law, Mass. Regs. Code tit. 105, § 410.832(B)(2)--rendered the post-deprivation remedy inadequate. He also says that during the seven days following the emergency closure he was otherwise occupied with dealing with the consequences of the closure (assisting tenants, draining the plumbing system).

The state's failure to provide a landlord with express notice that he can seek review may violate state law but does not render the review remedy constitutionally inadequate. In most civil matters, citizens are expected to ask about the method to protest or appeal an initial administrative action (or to hire a lawyer). An experienced landlord like Herwins would hardly suppose that no opportunity [*14] existed to challenge the emergency

shutdown order, even if he was not himself a lawyer (in fact he was).

As for the seven-day time limit, it appears that all that was required was the filing of a written petition. See Mass. Regs. Code tit. 105, § 410.850. Quite possibly, there are circumstances--perhaps present here, although we doubt it--where it is simply infeasible for an appeal to be noticed within seven days. If the state then refused to permit a belated appeal thereafter, this might raise a question whether state remedies were adequate, cf. *Roy v. City of Augusta, 712 F.2d 1517, 1523-24 (1st Cir. 1983),* but Herwins made no such effort to appeal even belatedly. n3

n3 Massachusetts courts tend to allow appeals where the untimeliness was a consequence of the actions of an administrative official. See *Eli & Bessie Cohen Hillel Academy, Inc. v. Director of the Div. of Employment Sec., 396 Mass. 150, 484 N.E.2d 1022, 1024 (Mass. 1985); Clemons v. Director of the Div. of Employment Sec., 395 Mass. 174, 478 N.E.2d 951, 953 (Mass. 1985).*

[*15]

When one steps back, Herwins plainly could have taken an immediate appeal on the emergency shutdown and shown that the heat had been turned back on and that the other violations were not threatening to health. This would have meant a brief inconvenience to Herwins and the tenants but it would likely have led to a prompt cancellation of the emergency closure. The idea that Herwins could ignore this state provided procedural

remedy, and then create a federal case and collect $55,000 damages for a denial of procedural due process, just makes no sense.

Indeed, Massachusetts law created not only the means for a swift undoing of Marotta's alleged mischief, but probably a damage remedy as well. In this state, public employees have no immunity from claims based on intentional (not negligent) torts. See Mass. Gen. Laws ch. 258, § 10(c) (1998); *Breault v. Chairman of the Bd. of Fire Comm'rs., 401 Mass. 26, 513 N.E.2d 1277, 1282-1284 (Mass. 1987).* Here, there is some reason to think that on his version of the facts Herwins has, or at least had, a state damage remedy against Marotta.

Accordingly, we conclude that a verdict should have been directed on count I. Count II merely reasserts [*16] that the lack of notice to Herwins in the letter of his right to seek further administrative review is an independent constitutional violation; and what we have already said confirms that the district judge properly dismissed that claim. Since both counts fail, the remaining arguments of parties as to damages, trial errors and attorney's fees for Herwins become moot.

The judgment of the district court on count I is reversed and the award of attorney's fees and costs is vacated and the judgment on count II is affirmed.

It is so ordered.

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-2140

M. JOE HERWINS,
Plaintiff, Appellant,

v.

THE CITY OF REVERE, ET AL.,
Defendants, Appellees.

No. 97-2141

M. JOE HERWINS,
Plaintiff, Appellee,

v.

THE CITY OF REVERE,
Defendant, Appellee,

JAMES J. MAROTTA,
Defendant, Appellant.

JUDGMENT

Entered: December 17, 1998

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgement of the district court on count I is reversed and the award of attorney's fees and costs is vacated and the judgment on count II is affirmed in accordance with the opinion filed this day.

By the Court:

Phoebe Morse, Clerk.
By JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Zaleznik and Schultz]

Appendix "C"

105 CMR 400.200: Local Enforcement

(A) General Procedures. Unless otherwise expressly provided in any article of the State Sanitary Code, each board of health may enforce the State Sanitary Code by fine in accordance with 105 CMR 400.700, or otherwise at law or in equity in the same manner that local rules and regulations are enforced; except however, 105 CMR 400.000 does not authorize a bill in equity in lieu of 105 CMR 400.100(C).

(B) Emergency Procedures.

(1) Whenever an emergency exists in which the interest of protecting the public health requires that ordinary procedures be dispensed with, the board of health or its authorized agent, acting in accordance with the provisions of M.G.L. c. 111, § 30, may, without notice or hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to meet the emergency. Notwithstanding any other provision of the State Sanitary Code, any person to whom such order is directed shall comply therewith within the time specified in the order. Each day's failure to comply with the order shall constitute a separate offense. Upon compliance with the order and within seven days after the day the order has been served, he may file a written petition in the office of the board of health requesting a hearing. He shall be granted a hearing as soon as possible but not later than ten days after the filing of the petition. The procedures for such hearing shall otherwise conform with the hearing requirements which would have existed had the order been issued under on-emergency circumstances.

(2) No provision of this subsection shall be construed as a limitation on the emergency powers of the Department of Public Health of the Commonwealth.

105 CMR 410.831: Dwellings Unfit for Human Habitation: Hearing: Condemnation: Order to Vacate: Demolition

(A) Finding that a dwelling or portion thereof is unfit for human habitation. If an inspection conducted pursuant to 105 CMR 400.100 or 105 CMR 410.820 reveals that a dwelling or portion thereof is unfit for human habitation, the board of health may (after complying with 105 CMR 410.831 (B), (C) or (D), if the dwelling is occupied) issue a written finding that the dwelling or portion thereof is unfit for human habitation. The finding shall include a statement of the material facts and conditions upon which the finding is based.

(B) Prior notification to occupant(s) and owner. If the dwelling or portion thereof is occupied, the board of health shall, prior to issuing a finding under 105 CMR 410.831 (A), provide written notice to the occupant(s) and owner which shall include:

(1) Identification of the dwelling (address and apartment number, if any);

(2) A copy of the inspection report;

(3) A statement that the board of health will consider issuing a finding that the dwelling or a specifically identified portion thereof is unfit for human habitation;

(4) A statement that this finding may result in an order of condemnation requiring the owner to secure the dwelling and requiring the occupant(s) to vacate the dwelling.

(5) A statement of the time and place of a public hearing which the board of health will conduct in order to determine whether the dwelling or portion thereof is unfit for human habitation, and whether an order to secure and vacate should be issued. The notice shall be served on the occupant(s) and owner in accordance with 105 CMR 410.833.

(C) Hearing if dwelling or portion thereof is occupied. If the dwelling or portion thereof is occupied, then the board shall, prior to issuing a finding under 105 CMR 410.831 (A), and at least five days after service of the notice required by 105 CMR 410.831 (B), conduct a public hearing to determine whether the dwelling or portion thereof is unfit for human habitation and whether an order to secure and to vacate should be issued. At the hearing the occupant(s), owner, or any other affected party shall be given an opportunity to be heard, to present witnesses of documentary evidence and to show why the dwelling or portion thereof should or should not be found unfit for human habitation, and why an order to vacate and an order to close-up should or should not be issued.

(D) Exception to notification and hearing requirements. If at any time the board of health determines in writing that the danger to the life or health of the occupant(s) is so immediate that no delay may be permitted, then the board of health may immediately issue a finding that an occupied dwelling or portion thereof is unfit for human habitation without providing the notification or hearing specified in 105 CMR 410.831 (B) and (C).

A copy of the determination of immediate danger, and a copy of the finding of unfitness for human habitation shall be sent to each affected occupant, and to the owner.

105 CMR 410.832: Content of Orders

(B) Subject to the emergency provision of 105 CMR 400.200(B), any order issued under the provisions of 105 CMR 410.000:

(2) shall contain notice of the right to a hearing; of the deadline and proper procedure for requesting a hearing; the right to inspect and obtain copies of all relevant inspection or investigation reports, orders, notices and other documentary information in the possession of the board of health; the right to be represented at the hearing; and that any affected party has a right to appear at said hearing;

Supreme Court, U.S.
FILED
MAR 22 1999
OFFICE OF THE CLERK

No. 98-1339

In The

Supreme Court of the United States

October Term, 1998

M. JOE HERWINS,

Petitioner,

v.

THE CITY OF REVERE AND JAMES J. MAROTTA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1699

QUESTIONS PRESENTED

1. Whether An Emergency Closure of a Building Effected Contrary to Established State Procedures Constitutes a Violation of the Procedural Due Process Rights of the Property Owner Where the State Provides an Adequate Post-Deprivation Remedy To Correct the Error?

2. Whether the Failure to Give Notice of a Right to Appeal As Required Under Published State Regulations After an Emergency Closure of a Building Rises to the Level of a Procedural Due Process Violation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. A Violation of Established State Procedures Does Not Violate Procedural Due Process if the State Provides an Adequate Remedy to Redress the Deprivation 5

II. Marotta's Failure to Notify Herwins of his Right to a Hearing In Violation of State Law Requirements Raises No Due Process Issue 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021, 673 N.E.2d 40 (1996) 10

Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994) 8

City of West Covina v. Perkins, 525 U.S. ___, 119 S.Ct. ___, 142 L.Ed.2d 636 (1999)..... 11

Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) 8

Harris v. City of Akron, 20 F.3d 1396 (6th Cir. 1994) 8

Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877 (2d Cir. 1996)..... 7

Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264 (1981) 7

Hudson v. Palmer, 468 U.S. 517 (1984).....6, 7

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ...6, 7

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 8

Nance v. Vieregge, 147 F.3d 589 (7th Cir. 1998) 8

Parratt v. Taylor, 451 U.S. 527 (1981).....5, 6, 7, 8

Powell v. Georgia Dept. Of Human Resources, 114 F.3d 1074 (11th Cir. 1997)..... 8

Wilson v. The Health and Hospital Corporation of Marion County, 620 F.2d 1201 (7th Cir. 1980) 9, 10

Zinermon v. Burch, 494 U.S. 113 (1990).....7, 8

REGULATIONS

105 CMR 400.200(B)(1)..... 7

105 CMR 400.832 2

TABLE OF AUTHORITIES – Continued

Page

105 CMR 410.750 2

105 CMR 410.831(D) 2, 7

105 CMR 410.832(B)(2) 9

STATEMENT OF THE CASE

The Court of Appeals, and not Petitioner, properly summarized the facts of this case. As set forth in the Court of Appeals' decision, this case arises from the action of a health inspector for the Respondent City of Revere ("Revere") in declaring a building unfit for human habitation. (Appendix to Petition ("App.") A2). Respondent James J. Marotta ("Marotta"), a health inspector for Revere, took this action because Petitioner M. Joe Herwins' ("Herwins") building was not properly heated, and lodgers were using gas stoves to provide heat in the middle of a New England winter. App. A2.

Herwins' property, located at 53A Walnut Avenue in Revere, Massachusetts, was a three story building, with rooms rented to members of the public. App. A2. On the morning of February 24, 1993, a complaint was lodged with the Revere Board of Health and the Boston Gas Company, regarding the smell of gas at the property. App. A2.

After the call, a Boston Gas representative and Marotta went to 53A Walnut Avenue to investigate. Marotta was the housing code inspector in Revere at the time, and was responsible for investigating complaints pertaining to the condition of housing units in the City. After inspection, they found that a resident had been using a gas stove to provide heat for his unit and this use had generated the strong odor of gas. Marotta concluded that there was no heat in the building after his inspection, and he reported his findings to his superior, the health agent. App. A2. Based upon the instructions from the health agent, Marotta returned to 53A Walnut Avenue later in

the day, along with other City officials from the Building Department, the Fire Department, as well as the Board of Health, to conduct a full scale inspection of the property. App. A2.

Based upon these inspections, Marotta and another inspector drafted a letter to Herwins which included a listing of violations of the State Sanitary Code. In the ultimate finding of the letter, Marotta and the other health inspector concluded that "Pursuant to 105 CMR 410.750, the above conditions are deemed to endanger and impair the health, safety and well-being of persons occupying the premises. In accordance with 105 CMR 410.831(D), the Revere Health Department has determined that due to the nature and severity of the violations found, danger to the premise's occupants is immediate and thus issues a finding that the occupied dwelling is unfit for human habitation and must be vacated forthwith." App. A2. Although the letter called for the building to be vacated, it did not notify Herwins that he had a right to appeal this determination to the Board of Health, as set forth in 105 CMR 400.832. App. A4.

Marotta served this letter upon Herwins and the occupants of 53A Walnut Avenue, and the tenants vacated the building shortly thereafter. App. A3. Herwins then drained the heating system for the building, but did nothing further with respect to the letter, either by way of an appeal to the Board of Health or to the Courts of the Commonwealth of Massachusetts. App. A10.

In October of 1993, Herwins, along with his counsel, met with Revere officials regarding his use of 53A Walnut

Avenue. App. A3. Herwins sought the meeting to determine what he had to do in order to reopen the property. At the meeting, the plumbing inspector for Revere told Herwins that, if he wanted to rent the units as apartments, that he had to have sanitary facilities for each unit. Previously, the second floor units, along with a unit on the third floor, shared a common bathroom on the second floor. Herwins, upon hearing this requirement, abruptly terminated the meeting, and took an appeal from the plumbing inspector's determination to the Board of State Examiners of Plumbers and Gas Fitters. App. A3.

After hearing, the State Board upheld the decision of the Revere plumbing inspector, and voted to deny Herwins' appeal on May 4, 1994. App. A3. Herwins sought no judicial review of the decision of the State Board, and took no further action with regard to 53A Walnut Avenue. Instead, the building remained unoccupied up to and including the time of trial. On November 2, 1995, Herwins commenced this action in the United States District Court for the District of Massachusetts to seek a determination that his constitutional rights to procedural due process had been violated in the course of the closing of his building. App. A3.

Herwins' complaint contained two counts, both limited to procedural due process claims. Count One alleged that the closure of his building without prior notice or hearing violated his procedural due process rights. Count Two claimed that the failure to notify Herwins of his right to appeal after the closure of the building constituted a separate procedural due process violation. App. A4. Revere and Marotta sought summary judgment on both claims, but the Trial Judge denied the motions. App. A4.

After trial, and a jury verdict in favor of Herwins against both Marotta and Revere, the Trial Judge set aside the verdict against Revere on Count One, and directed a verdict for both Revere and Marotta on Count Two. App. A5. On appeal, the Court of Appeals agreed with the Trial Judge's disposition as to Revere, but vacated the judgment as to Marotta. The Court of Appeals concluded that Herwins had failed to establish any violation of a constitutional dimension and directed the entry of judgment for both Revere and Marotta. Herwins' petition for a writ of certiorari now attempts to bring this matter to this Court.

REASONS FOR DENYING THE PETITION

This case raises pedestrian issues of procedural due process rights that this Court settled long ago. To deal with these issues, this Court has developed clear principles that have been faithfully applied in the circuits. Accordingly, to grant certiorari in this case would result in a restatement of settled law, of little benefit beyond the parties to this suit. The scarce resources of this Court should not be devoted to matters of such limited utility.

Herwins raises two issues in this Court. His first issue is whether there is a violation of procedural due process if an official abuses emergency procedures notwithstanding the availability or efficacy of post-deprivation remedies. His second issue is whether the failure of an official to provide notification of a right to appeal similarly violates procedural due process protections, even though state law may mandate such notice. The prior decisions of this Court have clearly held that there

is no violation of constitutional dimension in these circumstances, and there is no conflict among the circuits with regard to either issue.

I. A Violation of Established State Procedures Does Not Violate Procedural Due Process if the State Provides an Adequate Remedy to Redress the Deprivation.

As the Court of Appeals noted, this Court has clearly articulated the standards that must be met in order to establish a procedural due process violation. First, it is clear that a deprivation, standing alone, does not result in a due process violation. As this Court explained in *Parratt v. Taylor*, 451 U.S. 527, 536-537 (1981):

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of Law." Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

The *Parratt* Court concluded that the State could not practicably provide pre-deprivation process in the circumstances of the case. Accordingly, if the State provided adequate post-deprivation remedies, there could be no violation of procedural due process rights.

The rule in *Parratt* was extended to encompass intentional deprivations in *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). In *Hudson*, 468 U.S. at 533, the Court explained the principle as follows:

> If negligent deprivations of property do not violate the Due Process Clause because predeprivation process is impracticable, it follows that intentional deprivations do not violate that Clause provided, of course, that adequate state post-deprivation remedies are available. Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy.

The principles articulated in *Parratt* and *Hudson* were not applicable to the cases in which the deprivations were the result of the application of "established state procedures" as opposed to "random" or "unauthorized" conduct of public officials. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982). If the use of an "established state procedure" destroys an entitlement without

the safeguards required by the Due Process Clause, then the official may be held liable for a due process violation. *See also Zinermon v. Burch*, 494 U.S. 113, 135-139 (1990).

As the Court of Appeals noted, these principles controlled the outcome of this case. In an emergency, the Massachusetts regulations properly allowed for action without a hearing. *See Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 299-300 (1981). If the conditions at Herwins' property did not constitute a true emergency – a "danger to the life or health of the occupant(s) . . . so immediate that no delay may be permitted" – the regulations provided no authority to Marotta to declare an emergency. 105 CMR 410.831(D). App. A17. Accordingly, if Marotta deliberately or recklessly declared an emergency where none existed, his actions were unauthorized, and the only feasible remedy was a post-deprivation hearing, which Massachusetts provided under the State Sanitary Code. *See* 105 CMR 400.200(B)(1). App. A15. Since the post-deprivation procedure provided an adequate remedy, there was no deprivation of property without due process.

Notwithstanding Herwins' assertion to the contrary, there is no split among the circuits as to the meaning or applicability of *Parratt, Hudson, Logan* and *Zinermon*. Rather, the circuits have consistently and uniformly applied these principles in a variety of contexts. For example, the Second Circuit Court of Appeals dismissed an action by a contractor who had been debarred from bidding upon City contracts, allegedly in violation of the contractor's rights to procedural due process. *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-881 (2d Cir. 1996). The Second

Circuit held that no constitutional claim was available where there were state law remedies that could have corrected the claimed deprivation. The Sixth, Seventh and Eleventh Circuits are also in agreement with this analysis. *See Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994); *Easter House v. Felder*, 910 F.2d 1387, 1404 (7th Cir. 1990); *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998); *McKinney v. Pate*, 20 F.3d 1550, 1562-1563 (11th Cir. 1994); *Powell v. Georgia Dept. Of Human Resources*, 114 F.3d 1074, 1080-1082 (11th Cir. 1997).

The sole case that Herwins cites, *Armendariz v. Penman*, 31 F.3d 860 (9th Cir. 1994), is not to the contrary. In *Armendariz*, the Court noted that the State could provide no pre-deprivation process if the deprivation was the result of a random and unauthorized act. The Court concluded, however, that the actions taken or directed by the Mayor, City Attorney and other supervisory officials were taken under the apparent authority of state procedures, statutes and regulations and so *Parratt* did not apply. *Armendariz, supra*, 31 F.3d at 866. As with *Zinermon v. Burch*, 494 U.S. 113 (1990), *Armendariz* involved no official action contrary to established state procedures. Accordingly, when the officials utilized flawed procedures, they could be held liable for a due process violation.

This brief review of the applicable authorities demonstrates that this Court has generated a well-developed and carefully articulated body of law pertaining to procedural due process. The Court of Appeals in this case correctly applied these clear precedents. There is simply no need for this Court to revisit principles that have been

clearly established for almost twenty years. This Court should deny Herwins' petition on this ground.

II. Marotta's Failure to Notify Herwins of his Right to a Hearing In Violation of State Law Requirements Raises No Due Process Issue

The same principles of due process outlined above dispose of Herwins' second claim regarding the lack of notice of his right to appeal. According to Herwins, Marotta's failure to notify him that he had a right of appeal to the Board of Health violated his rights to procedural due process. As the Court of Appeals noted, Herwins' argument confuses a state law violation with a constitutional claim.

There was no flaw in the Massachusetts regulatory scheme. As Herwins notes, the State Sanitary Code required the code inspector (Marotta) to notify Herwins of his hearing rights, including the procedure for requesting a hearing, the deadline for such a request, the right to inspect the documents in the possession of the Board of Health, and the right to appear personally at the hearing and be represented by counsel. *See* 105 CMR 410.832(b)(2). App. A18. Any deviation from these procedures was unauthorized, and therefore, for due process purposes, any violation was not complete unless and until the State failed to afford appropriate post-deprivation remedies.

This essential distinction differentiates this case from *Wilson v. The Health and Hospital Corporation of Marion County*, 620 F.2d 1201 (7th Cir. 1980) on which Herwins relies. In *Wilson*, the statutory scheme provided for no notice at all, with the officials relying solely on the public

nature of the ordinance as their notice to the affected individuals. Accordingly, the flaw in *Wilson* was with the established state procedures, not with any unauthorized deviation from these procedures.

Where an official deviates from established state procedures, the inquiry then shifts to whether the state provides adequate post-deprivation remedies. As the Court of Appeals held, Massachusetts adequately provides for post-deprivation remedies where the local official fails to provide proper notice of the right to appeal. If Herwins could not have filed his appeal within the seven-day time limit because of lack of notice, he could have pursued a late filed appeal based upon the equitable principles adopted in Massachusetts. Under Massachusetts law, equitable tolling is available to preserve rights lost if the claimant is excusably ignorant regarding the deadline or is affirmatively misled by his adversaries. *See Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 1022, 673 N.E.2d 40 (1996) and cases cited. If the fact pattern in this case fit one of the exceptions, Herwins could have pursued his administrative appeal, notwithstanding the short deadline contained in the State Sanitary Code. If Herwins was not entitled to invoke the doctrine of equitable tolling, then it cannot be said that the State failed to provide him with an appropriate remedy, but only that Herwins failed to avail himself of the existing remedies to correct the errors. The Court of Appeals so held in this case, and their holding on a matter of state law is binding on Herwins.

Even if Massachusetts state law had not provided for notice, this Court has already determined that such notice

is not constitutionally required where notice of state mandated remedies is available in published, commonly distributed sources. *City of West Covina v. Perkins*, 525 U.S. ___, 119 S.Ct. ___, 142 L.Ed.2d 636 (1999). Herwins' attempts to distinguish *West Covina* are unpersuasive. Where, as here, notice of post-deprivation remedies were generally available to the public in the Code of Massachusetts Regulations, further notice was not mandated by the Due Process Clause.

In the final analysis, the Court of Appeals aptly summarized this case in its concluding remarks. As the Court of Appeals stated,

> When one steps back, Herwins plainly could have taken an immediate appeal on the emergency shutdown and shown that the heat had been turned back on and that the other violations were not threatening to health. This would have meant a brief inconvenience to Herwins and the tenants but it would likely have led to a prompt cancellation of the emergency closure. The idea that Herwins could ignore this state provided procedural remedy, and then create a federal case and collect $55,000 damages for a denial of procedural due process, just makes no sense.

Marotta's failure to follow state mandated requirements for notifying Herwins of his right to a hearing raises no substantial constitutional questions. This Court should decline to grant the writ on this issue.

CONCLUSION

The only constitutional questions raised in his petition set forth procedural due process issues that have long been settled by this Court. There is no conflict among the circuits concerning these principles, and the Court of Appeals in this case properly applied these principles. Accordingly, there is no basis upon which this Court should grant certiorari and this Court should deny Herwins' petition.

Respectfully submitted,

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